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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 535

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL,
Attorneys for Respondents,
25 Milwaukee Station,
Minneapolis, Minnesota.

Of Counsel:
A. N. WHITLOCK,
C. S. JEFFERSON,
Chicago, Ill.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition should be denied because the United States Circuit Court of Appeals for the Eighth Circuit and the District Court for the District of Minnesota correctly decided the questions involved in accordance with the Constitution and laws of the United States and in accordance with the applicable decisions of this Court and no substantial questions are presented to justify the granting of a writ herein.

The official report of opinion in the Court below (R. 188-198) is reported in 113 F. (2d) 919. The District Court did not write an opinion.

QUESTION PRESENTED

The Trial Court denied the Government's offer to prove the railroad and telegraph lines were constructed between

low and ordinary high water elevations of the Mississippi River (R. 146-147).

The Trial Court, at the close of the testimony, denied the motion of the Government to dismiss from the condemnation proceedings the four segments of land here involved (R. 152-155).

The important question determined by the Circuit Court of Appeals and now before this Court for determination is set out in the opinion of the Circuit Court of Appeals (R. 193) and is as follows:

> "Where a riparian owner of land bordering upon a navigable river, only a portion of the entire bed of which is used, and useful for the purposes of navigation under natural conditions, has built an embankment upon that part of his land lying between the ordinary high-water mark and the ordinary low-water mark of the river, which embankment does not interfere with or obstruct navigation, can the United States, for the purpose of improving navigation, build a dam in the river which raises its waters above their natural level and which floods the riparian owner's embankment, without incurring any liability to compensate him for injuries caused solely by raising the waters of the river above their natural level?
>
> "The Government contends that it has the right, in aid of navigation and without payment of compensation, to take or destroy property in the river bed; that this right extends to all property lying between the ordinary high-water marks projected horizontally from shore to shore; that the right of the United States thus to take or destroy property in the river bed without paying compensation includes those portions of such property which are situated above the ordinary high-water mark, and extends to intangible riparian rights, including the right to the natural level, width and flow of the stream.
>
> "The appellees contend that in Minnesota the fee title of a riparian owner extends to ordinary low-water mark,

subject to the paramount public right of navigation under the natural conditions of the stream; that the servitude of riparian lands to the public right of navigation is confined to the natural widths, levels and flows of the river, and that when the Government imposes a more onerous servitude than that upon such lands, it must pay for what it takes."

STATEMENT

The statement contained in the petition for writ of certiorari fails to include many facts essential to a proper understanding and determination of the petition. We will call attention to some of these important omitted facts.

The railroad has existed along the river since about 1870. It is now a double-track railroad and is the main line between Chicago, Milwaukee, St. Paul, Minneapolis and the Pacific Northwest. It is a busy stretch of railroad (R. 115), there being a large number of freight, passenger, and mail trains operated thereover (R. 99). The telegraph and telephone lines are important main trunk lines of the Railroad and Telegraph Companies (R. 115).

The 26 dams constructed across the river and bottom lands in the Upper Mississippi River permit slack-water navigation. That means the Mississippi River, instead of flowing as a stream, is flowing through a series of lakes (R. 113). Lock and Dam No. 5, near Minneiska, raises the natural water levels in the segments of the railroad here involved from 12 to 15 feet above low water elevation (R. 100, Rd. Ex. 2) and 5.6 to 7.5 feet above ordinary high water elevation (R. 140, R. 132).

Cross-Section at the End of Petition for Writ of Certiorari Is Misleading.

The cross-section sketch appearing on page 14 of the petition for writ of certiorari not only is not typical but does not remotely indicate the true situation at any of the claimed encroachment areas in either Winona or Wabasha Counties (Rd. Ex. 1, R. 179, Appendix V). Therefore, respondents have reproduced herein as Appendix I, II, III and IV an illustrative cross-section in each of the four claimed encroachment areas, each of which was reproduced in the briefs in the Circuit Court of Appeals. Appendix V is a portion of Railroad Exhibit 1 showing the three claimed encroachment areas in Winona County. Railroad Exhibit 1, on a reduced scale (R. 179), shows in blue, land which is flooded by the pool at elevation 660 (R. 97). A detailed explanation of this map appears in the record (R. 97-99).

Claimed encroachment areas III and II in Winona County are adjacent to Walters Creek. The end of Wing Dam 33, opposite area III and of Wing Dams 35, 36 and 37, opposite area II, are from 1,300 to 2,750 feet distant from the tracks. The navigable channel commences at the end of these wing dams (Rd. Ex. 1, R. 179, Appendix V). Land between wing dams and railroad is covered with "Brush and Timber" (Rd. Ex. 1, R. 179, Appendix V). Spot elevations show land above ordinary high water elevation distant from the railroad tracks as much as 1,250 feet in area III and as much as 600 to 1,700 feet in area II. Spot elevations above low water are shown still farther away from the railroad (Rd. Ex. 1, R. 179, Appendix II, III and V). In claimed encroachment area I, the near end of Wing Dam 108 is about 100 feet and the river end about 225 feet from the track. Scaling indicates upland extends out from the track for a distance of 50 to 110

feet throughout this claimed encroachment area. Wing Dam 107, near the western edge of this encroachment area, extends about 450 feet out from the track (Appendix V). The purpose of the wing dams, as testified to by the various witnesses, was to keep the channel away from the shore (R. 96) and to keep a deep channel (R. 110, 113). Anything that will restrict the channel between the ends of the wing dams would be helpful to navigation (R. 113).

During the trial, the parties entered into stipulation which, among other things, provided that said stipulation "shall not deprive either of the parties herein from herein proving or disproving the waterway along the claimed encroachments are or are not in fact navigable waterways of the United States" (R. 145). The Government, in its petition and in accordance with the order for immediate possession on August 4, 1934, took respondents' property in Winona and Wabasha Counties (R. 23-31) including the claimed encroachment areas, but did not submit any proof to show whether or not Walters Creek adjacent to areas II and III was or was not a navigable waterway of the United States. The Government did not claim that any structure of respondents' here involved obstructed navigation in the river (R. 137). The Government did not offer to prove any part of the railroad was below ordinary high water mark when the condemnation proceedings were commenced or when immediate possession of the respondents' property was granted. The rejected offer to prove related to a condition claimed to exist in 1909 or 1910 (R. 146, 151).

Undisputed Facts.

1. The District Engineer of the respondent Railroad in December, 1909, wrote to Major Riche, United States District Engineer in charge of this portion of the Mississippi River, stating the Railroad intended to double-track and to make certain changes in its alignment at points shown in red on the map (U. S. Ex. 70, R. 149) and also requesting permission to proceed with the work (R. 147-149). On Exhibit 70, the vertical figure 4800 is a railroad station in the claimed encroachment area in Wabasha County. Railroad Station 4930 was in claimed encroachment area III in Winona County and Railroad Stations 4950 and 4960 were in claimed encroachment area II in said county. That exhibit made on November 9, 1909, shows areas II and III were in "Low marshy land." Stations 4980 and 4990 are in claimed encroachment area I (R. 149). Major Riche, in answer, advised that in the proposed new line he found nothing "prejudicial to the interests of navigation or in any way interfering with the proposed Government improvement of the river" (R. 151).

2. The railroad was made into a double-track railroad and the alignment changed in 1910 (R. 142).

3. The four claimed encroachment areas are shown in the stipulation of the parties (R. 121 and 125) and the three located in Winona County are shown on a larger scale in the portion of Railroad Exhibit 1 hereto attached as Appendix V. The condemnation proceedings included the claimed encroachment areas (R. 6, 9, 13, 15, 16, 17).

4. The testimony was undisputed that the Railroad and Telegraph Companies' embankments, tracks, culverts, bridges, poles and other facilities within the limits of this

ppeal were in good condition and adequately protected to ithstand river and ice action under natural conditions of ie Mississippi River and its tributaries (R. 116).

5. In Winona County, respondents have not stipulated or onceded that any portion of their property was located on nd below ordinary high water elevation of the river when roceedings herein were commenced or possession of their roperty taken by the Government (R. 118-120). Such a oncession was made in Wabasha County (R. 123).

6. In the summarized statement, it is conceded "compe- nt and sufficient evidence was introduced by the Railroad ompany and the Government to support and sustain the erdict as to the need for protecting the property of the ailroad and Telegraph Companies under the new changed onditions and to sustain the verdict as to the amount there- f as to each item of damage claimed by and allowed to the ailroad and Telegraph Companies by the jury" (R. 118).

7. The summarized statement concedes "the character, mount and necessity for the measures taken to protect the ailroad and Telegraph Companies from the waters raised nd impounded by Lock and Dam No. 5 and the reasonable ost of such protective measures is not at issue on this ap- eal by reason of the stipulation of the parties. * * * or that reason, the voluminous testimony showing the ac- ual protective measures taken and the cost thereof has been mitted in this Bill of Exceptions" (R. 118).

8. The petitioner conceded the structures of the Railroad nd Telegraph Companies in each of the claimed encroach- ent areas were located on land which was at an ele- tion above the low water (R. 144) but offered to prove the ructures were constructed between low and ordinary high ater mark elevations of the river (R. 143, 146).

9. It was conceded by the Government's attorneys that the 669 pool will raise the river water level six or eight feet above the elevation claimed by the Government to be the ordinary high water mark of the river (R. 132-133). The proof showed it would be 5.6 feet to 7.5 feet in the claimed encroachment areas (R. 140).

10. The Government conceded no damage would occur to the Railroad and Telegraph Companies unless the Government artificially raised the water level of the Mississippi River to a point higher than ordinary high water mark (R. 132-133, 142-143), and "that all of the damages sustained by the Railroad and Telegraph Companies are caused by the waters of the Mississippi River being raised to a level higher than ordinary high water mark" (R. 146).

11. "The Railroad Company is the riparian owner in the segments involved in this appeal" (R. 145).

12. It was conceded by counsel for the Government that the construction of the railroad between low water mark and ordinary high water mark did not actually interfere with navigation but it was claimed same became a financial obstruction if the Government had to pay compensation for the cost of protecting same against waters raised by the Government's lock and dam (R. 135-137).

13. The record shows that all lands shown in blue on Railroad Exhibit 1 (R. 179) were covered with timber. The trees ranged from 48 inches in diameter down to brush (R. 98).

14. Immediate possession of the easement in respondents' property including the portion in the four claimed encroachment areas was taken by the Government on August 4, 1934 (R. 25-31, 6, 13).

Certain Misleading and Incomplete Statements in the Petition Should Be Clarified.

On page 3 of the petition, it is stated in substance that by reason of the removal "of the timber and underbrush in the margins of the river and in the area to be flooded" the railroad "embankment was thereby exposed to greater wind, wave and ice action, which made it necessary for the defendants to riprap and otherwise protect their embankment" (R. 116). This is only a part of the picture. In the agreed summarized statement of facts, it is stated:

> "The testimony was undisputed. The Railroad and Telegraph embankments, tracks, culverts, bridges, poles and other facilities within the limits of this appeal were in good condition and adequately protected to withstand river and ice action under natural conditions of the Mississippi River and its tributaries.
>
> "The testimony of each of said witnesses was that as to the portions of the Railroad and Telegraph properties included in this appeal, certain protective measures had to be taken in order that such properties could continue to be operated in the same safe and efficient manner after the raising of the water to pool level as they were operated under natural conditions of the Mississippi River. * * *
>
> "All of the witnesses testified that the impounding of the river water upstream from Dam No. 5 to the normal pool level would cause water, and, in the winter, ice, to strike the railroad embankments at a much higher elevation than under natural ordinary stages and flows of the Mississippi River. That the railroad embankments because thereof would be saturated at least up to the pool level and needed riprap (rock) protection to stabilize the embankments so as to safely carry the heavy engines and trains operating on the railroad. That riprap was required to protect the railroad embankments

from wave action on the new pool level and also to protect such embankments from ice movement on the pool caused by expansion and contraction in the winter and from movement of ice floes on the spring breakup caused by wind and current.

"They all testified that embankment protection (rock riprap) was required upon the railroad embankments at the locations where it was in fact placed and proposed by the Railroad in the areas covered by this appeal. The only dispute concerned the quantity of and elevation to which such riprap should be carried above normal pool elevation."

On page 4 of the petition, it is stated the Railroad, in double-tracking its railroad placed "portions of their embankment across the bends of the Mississippi * * *." This is both misleading and incorrect. In claimed encroachment areas II and III, the river bends away from the railroad and is located from 1,300 feet to 2,700 feet distant from the railroad tracks. A comparison of this actual situation with the cross-section referred to on page 14 of the petition clearly shows that both the statement and cross-section give an improper picture of the true situation (U. S. Ex. 70, R. 149, Ex. "A," R. 125, 121, Rd. Ex. 1, R. 179, and Appendix V).

On page 5 of the petition, line 3, it is suggested the obstructions to navigation referred to by the Trial Court referred only to those which were a "menace to navigation." We do not contend that an obstruction has to necessarily be a menace before the Government can require its removal. It is our view the Government can require the removal of structures which interfere with, impede and obstruct navigation as well as those which are a menace to navigation.

On page 5 of the petition, it is stated the Appellate Court held the flooding of appellees' property above ordinary high water mark was a compensable taking even though the dam-

aged structures were located in the bed of the stream (R. 188-198). It should be kept in mind the Circuit Court of Appeals, in using the language similar to that just referred to, was referring to the bed of the stream as including all of the portions of the low lands which were below ordinary high water mark elevation, even though such low lands with timber, brush and willows growing thereon, extended for hundreds and, in some instances, thousands of feet on each side of the main stream of the Mississippi River (Appendix V).

ARGUMENT

The Offer of Proof.

The Government offered to prove that three segments of respondents' property in Winona County and one segment in Wabasha County, each segment at times being referred to as an encroachment area, "are constructed on land which is located below ordinary high water mark and above low water mark. * * * The Government concedes the embankments were constructed above low water mark" (R. 146, 67).

Respondents objected to the offer of proof upon the ground, among others, "that the fact which the Government proposes to prove is immaterial" (R. 147) and that the waterway adjacent to claimed encroachment areas II and III (Walters Creek) is not a navigable waterway of the United States (R. 147). The Court sustained the objection to the offer of proof (R. 147, 67).

The exhibits under discussion in connection with said offer of proof related to conditions existing in 1909 prior to the double-tracking in 1910 (see Gov. Exs. 69, 70, 71, R. 147-151) (Rd. Ex. 2, Gov. Ex. 9, as to location of original ground line prior to 1910, R. 102, 141).

As to the segment of land in Wabasha County, after the

trial, by stipulation, appellees conceded their railroad embankment not only in 1910 but also when the petition for condemnation was filed in 1933 was located on land between low and ordinary high water elevations of the river (R. 123, 14).

However, the Circuit Court of Appeals, in its opinion, stated:

> "For the purposes of this opinion, we shall assume that the 'encroachment areas' are all upon lands lying below ordinary high water mark and above low water mark" (R. 191).

The three claimed encroachment areas in Winona County are indicated on the portion of Railroad Exhibit 1 attached hereto as Appendix V. The waterway immediately adjacent to and riverward from the so-called encroachment areas II and III, designated "Walters Creek," it is asserted by appellees, was not a navigable waterway of the United States, and the offer of proof was objected to on that ground (R. 147). Most of the evidence showing this fact was excluded from the record on appeal to the Circuit Court of Appeals by the United States District Judge who passed upon the record after the death of the Trial Judge (His Honor, Judge Molyneaux) upon the ground such record was immaterial on this appeal.

The River Shore Line of 1910 Not Necessarily the Same in 1934.

Even if it be a fact that the Railroad constructed its new alignment in 1910 between low and ordinary high water elevations, such fact is no evidence that in 1934, when immediate possession was taken by the Government, the shore line of the Mississippi River had continued to be the same.

Brooks vs. United States (C. C. A. 8), 146 Fed. 223, 229.
C., St. P., M. & O. Ry. Co. vs. Rorig (C. C. A. 8), 217 Fed. 953.

In fact constant changes are taking place in the Mississippi River shore lines.

Harrison, et al., vs. Fite (C. C. A. 8), 148 Fed. 781, 785.

The Offer of Proof Was Immaterial.

Many cogent reasons exist for sustaining the holding of the Trial Court that the offer of proof was immaterial (R. 145-147). The same reasons indicate the respondents are entitled to receive compensation from the Government for the flowage easements taken in the property here involved, even though it be assumed (contrary to the fact in Winona County) the railroad, when immediate possession of same was taken by the Government, was located between low and ordinary high water elevations.

1. Respondents are concededly riparian owners in the segments in question (R. 145).[1]

2. The waterway (Mississippi River) adjacent to claimed encroachment area No. I in Winona County and the claimed encroachment area in Wabasha County is a navigable waterway of the United States (Rd. Ex. 1, R. 179, Appendix I, IV and V). On the other hand, the waterway (Walters Creek) adjacent to claimed encroachment areas II and III in Winona County is not a navigable waterway of the United States (Rd. Ex. 1, R. 79, Appendix II, III and V).

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[1] "The question of title of a riparian owner is one of local law."
Whitaker vs. McBride, 197 U. S. 510, 516.
Hardin vs. Jordan, 140 U. S. 371.
Brewer-Elliott Oil & Gas Co. vs. U. S. (1922), 260 U. S. 77.
Lamprey, et al., vs. St. of Minn., 52 Minn. 181, 192.

Walters Creek Was Not a Navigable Waterway of the United States.

At the trial, the Government was by stipulation permitted to prove Walters Creek was a navigable waterway of the United States (R. 145). Respondents' objection to the Government's offer of proof (Assignment of Error 12) asserted, as one of its grounds, the waterway along claimed encroachment areas II and III was "not a navigable waterway of the United States" and "not a waterway in which there is any practical possibility of its being used as a highway for interstate or foreign commerce" (R. 147).

The Government did not prove or offer to prove this waterway was a navigable waterway of the United States. They did not prove any past or prospective commerce, or that boats had or could enter or use this waterway, or that any habitation, industry, building or commodity for shipment existed along this waterway.

As indicated on Railroad Exhibit 1, the creek decreases in size as one goes upstream, passing under the railroad at Bridge L-82 (R. 179, Appendix V).

Such a waterway is not a navigable waterway of the United States.[2]

3. In Minnesota, the riparian owner owns the fee to low water mark on navigable waterways.[3]

Beyond low water mark, the State owns the bed "in trust".

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[2]Harrison vs. Fite (C. C. A. 8), 148 Fed. 781, 783, 784.
United States vs. Doughton, et al. (C. C. A. 4), 62 F. (2d) 936, 938.
State of Oklahoma vs. State of Texas, 258 U. S. 574, 591.

[3]Morrill vs. S. A. F. W. P. Co., 26 Minn. 222, 226, 228.
Lake Superior Ld. Co. vs. Emerson (1888), 38 Minn. 406.
Hanford vs. St. P. & D. Rd. Co. (1890), 43 Minn. 104, 111.
Miller vs. Mendenhall (1890), 43 Minn. 95.

for the general public but apparently has no *"jus privatum"* in the beds of navigable waterways.[4]

The *"jus privatum"* in the beds of such streams is in the riparian owner subject only to the *"jus publicum"* in the State.[5]

4. The riparian owner in Minnesota, also has certain riparian rights such as the right to build wharves, etc., out to the navigable channel and such wharves, etc., if they do not actually obstruct or interfere with the navigation, cannot be taken, even by the State, without just compensation.[6]

5. If public interests are not prejudiced, the submerged lands can be reclaimed by the riparian owner from a navigable waterway and thereby same become dry land and it is to the interests of the State that such waste lands be reclaimed.[7]

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[4]State vs. Korrer (1914), 127 Minn. 60.
Bradshaw vs. Duluth Imperial Mill Co. (1892), 52 Minn. 59.

[5]Hanford vs. St. P. & Dul. Rd. Co., supra.
Hobart vs. Hall, 174 Fed. 433.
Hall vs. Hobart (C. C. A. 8), 186 Fed. 426.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co. (C. C. A. 8), 99 F. (2d) 902, 912.

[6]Union Depot Co. vs. Brunswick, 31 Minn. 297, 301.
Carli vs. Stillwater St. Ry., 28 Minn. 373.
Miller vs. Mendenhall, 43 Minn. 95.
Lamprey, et al., vs. State of Minn., 52 Minn. 181, 192.
Lake Superior Land Co. vs. Emerson, 38 Minn. 406.
State vs. Korrer, 127 Minn. 60.
Hanford vs. St. P. & D. Rd. Co., supra, at p. 118.
Yates vs. City of Milwaukee, 77 U. S. 497, 507.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
United States vs. Great Falls Mfg. Co., 112 U. S. 645.
Dutton vs. Strong & Goodnow, 1 Black 23.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co., supra, page 912.

[7]Hanford vs. St. P. & Dul. Rd. Co., supra, page 118.
Union Depot Co. vs. Brunswick, supra.
Bradshaw vs. Duluth Imperial Mill Co., 52 Minn. 59.

If land is reclaimed by artificial means, the presumption is same has not been reclaimed beyond the point of navigability. See *Union Depot Co. vs. Brunswick, supra,* at page 303. As therein stated, "the usual and often the only practical way on the Mississippi and its tributaries (is) by reclaiming the land by artificial filling in with earth out to the requisite depth of water."

6. "The servitude of private lands to navigation is confined to the natural widths, levels and flows of the river." If more is taken, the Government must compensate the owner for such taking.[8]

All of the compensation awarded to the respondents herein was awarded to compensate them for damages caused by the artificial changing and raising of the levels of the Mississippi River and its tributaries permanently. All of the damages herein involved concededly are caused solely by the natural levels of the river being raised by Lock and Dam No. 5 above ordinary high water mark (R. 146, 132, 133, 142-143).

The water levels are raised by the dam in each of the four claimed encroachment areas 15.3 feet, 14.8 feet, 14 feet, and 12 feet above low water (Rd. Ex. 2 and Appendix I, II, III, IV) and 7.5 feet, 7.1 feet, 6.9 feet and 5.6 feet respectively above ordinary high water elevation (R. 140, Rd. Ex. 2 and Appendix I, II, III and IV).

The Federal Courts clearly support the principle just stated.[9]

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[8] Weaver vs. Mississippi & Rum River Boom Co., 28 Minn. 534, 538. Carlson vs. St. Louis River Dam & Improvement Co., 73 Minn. 128, 133.

[9] See Kincaid vs. United States (D. Ct., W. D., La., N. D.), 37 F. (2d) 602, 607.
Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34, 37 (1930).
Jacobs vs. United States, 290 U. S. 13, 54 S. Ct. 26.

In *United States vs. C., B. & Q. Rd. Co.* (C. C. A. 8), 82 F. (2d) 131 (Writ of Certiorari denied, *U. S. vs. C., B. & Q. Rd. Co.*, 298 U. S. 689), at page 134, it is said:

> "As a foreword, it may be premised that, if well-nigh the unanimous voice of *stare decisis* shall be heeded, appellee had the right to build its railroad along the bank of the Mississippi, even though a navigable stream, and that in so doing it had the legal right to rely upon the continued maintenance of the natural level, width and flow thereof. And that the right to increase artificially this level, width and flow (to the hurt of the appellee) beyond that provided by nature, could be obtained by appellant only by the exercise of the sovereign right of eminent domain, and the payment to appellee of just compensation for the damages by it sustained."

A leading case is *United States vs. Cress, United States vs. Kelly*, 243 U. S. 316, 332. In those cases, certain locks

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United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161, 170.
United States vs. Lynah, 188 U. S. 445.
Yates vs. City of Milwaukee, supra.
Pumpelly vs. C., B. & M. Co., 13 Wall. 166.
Eaton vs. Boston Ry. (1872), 51 N. H. 505.
United States vs. Great Falls Mfg. Co., 112 U. S. 645.
Kaukauna Wtr. Pwr. Co. vs. Green Bay & M. Canal Co. (1891), 142 U. S. 254.
Monongahela Navigation Co. vs. United States, supra.
Paine Lbr. Co. vs. U. S. (1893), 55 Fed. 854.
King vs. United States (C. C., D. S. C.) (1893), 59 Fed. 9—Appeals dismissed, 164 U. S. 703.
Williams vs. U. S. (1900), 104 Fed. 50—Affirmed in United States vs. Williams, 188 U. S. 485.
Thompkins vs. United States (1910), 45 Ct. Cls. 64, 66.
Heyward vs. United States (1911), 46 Ct. Cls. 484, 52 Ct. Cls. 87—Affirmed in United States vs. Heyward, 250 U. S. 633.
Peabody vs. United States (1913), 231 U. S. 530, 34 S. Ct. 159.
Richards vs. Washington Terminal Co. (1914), 233 U. S. 546, 34 S. Ct. 654.
Patrick J. Hurley, Secretary of War, vs. Kincaid (1932), 285 U. S. 95—Reversing United States vs. Kincaid (1931), 49 F. (2d) 768.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co., supra, p. 912.

and dams backed up water into White Oak and Miller Creeks. The Trial Court failed to find whether White Oak Creek was or was not navigable. This Court, in said cases, discusses the rights of States and the authority of Congress as to navigable streams. On page 319, this Court said:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks * * * *subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations,* * * * *the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation.* (*Monongahela Navigation Co. vs. U. S.*, 148 U. S. 312, 336; *U. S. vs. Lynah*, 188 U. S. 445, 465, 471.)"

On page 321, the Court says:

> "* * * *riparian owners have a right to the enjoyment of the natural flow without burden of hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right* (citing cases in note)."

On page 326, the Court further said:

> "*But the authority to make such improvements (raising WATER LEVELS BY dams, etc.)* is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power like others, *must be exercised, when private property is taken, in subordination to the Fifth Amendment. Monongahela*

Navigation Co. vs. United States, 148 U. S. 312, 336; *United States vs. Lynah*, 188 U. S. 445, 465, 471. And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams."

The Railroad and Telegraph Companies, in building their railroad and telegraph lines *"had a right to rely upon the history of the height to which the water had risen at various flood periods and its natural height in determining the elevation to which it was to be constructed.* If the elevation of the water is raised beyond its natural stage by artificial means and a flowage easement established, as in the instant case, it would seem that the owner of the land affected must be justly compensated for the damages thus sustained."

See *United States vs. Wabasha-Nelson Bridge Co.* (C. C. A. 7), 83 F. (2d) 852, 854.

The public easement of navigation on the river fluctuates, ordinarily being low in the winter and summer, higher in the fall and highest in the spring. The Government has no right to continuously maintain the water levels at the spring or fall levels. When the flow of the water in the river provided by nature is at a low level, the servitude of public navigation must necessarily be at the same low level.

In the instant case, the Government has taken from respondents the right to maintain their railroad and telephone and telegraph lines at the natural levels of the river. They had and exercised this right prior to the commencement of

the condemnation proceedings here involved.

See *United States vs. Wheeler Township* (C. C. A. 8), 66 F. (2d) 977, 984.

We submit the foregoing decisions demonstrate in the instant case: (1) that the public easement of navigation is limited to the natural widths, levels and flows of the river, (2) that the respondents are entitled to the continuous maintenance of the levels, widths and flows provided by nature in Walters Creek and in the Mississippi River, and (3) that all property of the respondents which was adequately protected against and, therefore, not affected by the natural levels, widths and flows of Walters Creek and the Mississippi River was private property and to the extent that such property is affected by the alteration in the natural flows and the raising of the natural levels by Dam No. 5, compensation must be made to respondents.

7. This Court has definitely held where property of a riparian owner is located between low and ordinary high water elevations of a navigable river and same does not obstruct or interfere with navigation in the river, the owner of such property may recover compensation from the Government for a partial taking of such property caused by raising the water levels above natural levels.

So far as here material, the Fifth Amendment to the United States Constitution provides:

> "No person shall be * * * deprived of * * * property without due process of law; nor shall private property be taken for public use without just compensation."

In *United States vs. Lynah*, 188 U. S. 445, the principal question involved was whether or not the artificial raising of the water levels of a navigable river, so as to destroy

Lynah's rice plantation located between low and ordinary high water marks of the Savannah River, constituted a taking of Lynah's property where such water levels were raised in aid of navigation under the commerce clause of the Federal Constitution. On page 468, this Court said:

> "Was there a taking? There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate title. * * *.
>
> "Some question is made as to the meaning of the findings. *It appears* from the 5th finding, as amended, *that a large portion of the land flooded was in its natural condition between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other;* that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. * * * both by seepage and percolation through the embankment, and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation 18 inches; that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the Government has undertaken. Does this amount to a taking?"

On page 474, the Court said:

> "Following the settled law of this Court, we hold that there has been a taking of the lands for public uses, and that the Government is under an implied contract to make just compensation therefor."

The Lynah case is in accord with earlier decisions and has been followed in a number of decisions.[10]

Attention is called to the fact that in the Heyward case, the Savannah River was only raised 22 inches above low water on the property there involved. In the instant case, at the four claimed encroachment areas, the river was raised from 12 feet to 14.8 feet above low water and from 5.6 feet to 7.5 feet above ordinary high water elevation (Rd. Ex. 2, R. 140, Appendix I, II, III and IV).

In the Wabasha-Nelson Bridge Co. case, as shown on page 853, the base of the roadway embankment in question was in some places above ordinary high water mark and at other places below such level. The following statement by the Court shows this to be the fact:

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[10] **Williams, et al., vs. United States** (1900), 104 Fed. 50.
United States vs. Williams, 188 U. S. 485.
King vs. United States, 59 Fed. 9—Appeal from this decision dismissed by United States Supreme Court in **United States vs. King**, 164 U. S. 703.
Lowndes vs. United States, 105 Fed. 838.
Heyward vs. United States, 46 Ct. Cls. 484.
United States vs. Heyward, 250 U. S. 633.
Illinois Central Rd. Co. vs. St. of Illinois, et al., 146 U. S. 387.
Yates vs. City of Milwaukee, 77 U. S. 497.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
Dutton vs. Strong & Goodnow, 1 Black 23.
Hanford vs. St. P. & Dul. Rd. Co., 43 Minn. 104, 118.
Jacobs vs. United States, 290 U. S. 13.
Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34, 37.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134—Writ of Cert. denied in **United States vs. C., B. & Q. Rd. Co.**, 298 U. S. 689.
United States vs. Wheeler Township (C. C. A. 8), 66 F. (2d) 977.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161, 170.
United States vs. C., B. & Q. Rd. Co., 302 U. S. 714.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 854.
Hurley vs. Kincaid, 285 U. S. 95, 104.

"It was also determined that an ordinary high water stage would not exceed an elevation of 665 or 666 feet; thus leaving a vertical spread of 10 to 11 feet at the time of an ordinary high water. The natural flow of the water at such times would contact the embankment at this elevation, but would fluctuate and not remain the same at all times. During many months of the year the water level would, of course, be much lower than that elevation."

Respondents' Property for Which Compensation Was Herein Granted Did Not Obstruct Navigation.

At low water stages, the entire railroad embankment in each of the four claimed encroachment areas rests upon dry land. There are wing dams riverward from the railroad in each area (Rd. Ex. 1, R. 179, Appendix V). The purpose of these wing dams is to keep the channel away from the shore (R. 96). "Anything that would restrict the channel between the ends of the wing dam would be helpful to navigation" (R. 113). In the encroachment area in Wabasha County, the Government constructed Wing Dam No. 48 and Wing Dam No. 49 (Rd. Ex. 1, R. 179). In Winona County, it has constructed Wing Dam No. 33 in area III, Wing Dams 35, 36 and 37 in area II, and Wing Dams 107 and 108 in area I (Appendix V). In areas II and III, the nearest edge of the channel of the river varies from 1,300 to 2,100 feet at right angles from the railroad with timber, willows and brush on the intervening land (Appendix V).

As shown by House Document No. 290, 71st Congress, 2nd Session:

"These dams (including Dam No. 5) would provide a nine-foot depth in the section of the river canalized."

Counsel for the Government did not claim any of the re-

spondents' structures would obstruct navigation (R. 135, 137). Their sole claim was if required to pay for taking such structures, same would constitute a financial burden (R. 135, 137). The Circuit Court of Appeals found the railroad embankment was not an obstruction to navigation stating the "embankment does not interfere with or obstruct navigation" (R. 193).

The Circuit Court of Appeals, in its opinion, further very aptly said:

> "Since the embankment and structures of the appellees are not claimed to be, and are not, obstructions to navigation, and have not been determined by Congress to be such obstructions, we think that, under the rule announced in the Lynah and Cress cases, the flooding of appellees' property, here involved, above ordinary high water mark was a taking of their property, for which they were entitled to compensation" (R. 197-198).

Cases Relied Upon by Petitioner Are Not in Point.

The misleading cross-section appearing as an appendix to the petition for a writ of certiorari gives the erroneous impression that the railroad embankments are located in the channel of the river.

In Wabasha County, the railroad in the claimed encroachment area is on the bank of the river as indicated in Appendix IV.

In Winona County, the railroad, in encroachment area I, is landward from but near the Minnesota bank of the river (Appendix I). Area II is about 1,400 feet from the channel of the river (Appendix II), and area III is about 2,000 feet from the channel of the river (Appendix III) (see also Appendix V).

It should be kept in mind that the availability of the property of a riparian owner between low and ordinary high water marks on a tidal water is very different from the availability of land so located on a navigable inland river. On the Mississippi River, portions of the land between low and ordinary high water elevations could at certain short periods of the year be made available for navigation of canoes, rowboats and duckboats if the willows, brush, trees and other vegetation were cleared from such area. Such areas, however, have no practical usability as a highway of interstate commerce. On the other hand, in tidal waters, as brought out in the Willink case, the low and ordinary high water levels are constantly changing by the tides and the area between said elevations is available for substantial commerce during some periods of each day.

Respondents are of the same view as that expressed by the Circuit Court of Appeals (R. 197-198) that the Lynah and Cress cases are controlling in the instant case.

In the Lynah case, the land between low and ordinary high water marks was used as a rice plantation. In the instant case, such land was used as the main line of a railroad and telegraph company. This Court, in the Lynah case, considered and discussed three of the cases now relied upon by the Government, to-wit:

Scranton vs. Wheeler, 179 U. S. 141.
Gibson vs. U. S., 166 U. S. 269.
Mills vs. U. S., 46 Fed. 738.

Therefore, a further discussion of said cases would seem to be unnecessary.

The petitioner, apparently, is of the view that the Lynah case should be re-examined by this Court, asserting same to be inconsistent with such cases as:

Philadelphia Co. vs. Stimson, 223 U. S. 605.
Willink vs. U. S., 240 U. S. 572.
Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251, 276.

The Lynah case has, of course, been cited by this Court in many decisions subsequent to the decisions in the cases just mentioned. For example, see:

Jacobs vs. U. S., 290 U. S. 13, *27.*
U. S. vs. Cress, 243 U. S. 316, *326.*
Hurley vs. Kincaid, 285 U. S. 95, 104.

The Circuit Court of Appeals (R. 196-197) brings out distinguishing features. Special attention is also called to the following in said opinion (R. 196):

> "It is interesting to note that in the Cress case, at pages 320-321 of 243 U. S., the Supreme Court cites *Greenleaf-Johnson Lumber Co. vs. Garrison, supra; Philadelphia Co. vs. Stimson, supra,* and *Willink vs. United States, supra,* in support of the general rule 'that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the Government control and regulation necessary to give effect to that right'; and then points out that 'it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures'; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right."

The structures for which Willink claimed damages were within the harbor limits of a navigable tidal waterway. The structures were held to be obstructions to navigation. The Government threatened to take the property, changed its plans and, in fact, did not take the property. The case did not involve damages caused by artificially raised water levels.

In *Greenleaf-Johnson Lbr. Co. vs. Garrison, supra,* in quoting from the Stimson case, *supra,* on page 262, this Court said:

> "It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation."

The Garrison case also involved structures in a navigable tidal water. The Government proposed to dredge the portion of the waterway where said structures were located. The structures were within the harbor lines and were actual obstructions to navigation. The case did not involve the artificial raising of the water levels.

This Court, on page 262 of the Garrison case, distinguishes it from *Yates vs. City of Milwaukee, supra,* as follows:

> "* * * There was no proof in the record that the wharf involved was in fact an obstruction to navigation * * *"

There was no such proof in the instant case. On the contrary, the railroad embankments, as previously pointed out, have been aids to navigation.

In *United States vs. Chandler-Dunbar Water Pwr. Co., et al.,* 229 U. S. 53, 33 S. Ct. 667, 673, Congress by act had determined that the whole river between the American bank and the International line, etc., was necessary for the par-

poses of navigation. Attention is called to the fact that compensation was awarded under finding of fact No. 45 of the Trial Court in the case for parcels 95 and 96, same being filled in land used as a wharf on deep water.

A brief summary of our view of some of the cases relied upon by the Government may be helpful.

1. We do not claim the Government cannot deepen the channel of a navigable waterway.[11]

2. We do not claim the Government may not, in a proper case, improve and restrict the navigable channel and thereby take the waterway from the riparian owner in aid of navigation by cutting off his access to the river.

Gibson vs. United States, 166 U. S. 269.

3. We concede the burden is upon the land owner to prove the Government structures will in fact cause his property to be overflowed. Speculation and conjecture that such property may be damaged is not enough.

Sanguinetti vs. United States, 264 U. S. 146, 149.

4. We concede a land owner is not entitled to an injunction to enjoin the damming of a waterway, even though such land owner will be overflowed to a minor extent, and this is particularly true where a reasonable provision is made to pay lawful compensation.

Manigault vs. Springs, 199 U. S. 473, 487.

5. To recover, we concede there must be an actual invasion of claimant's land. A Government operation six miles

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[11] Lewis Blue Point Oyster Co. vs. Briggs, 229 U. S. 82.
West Chicago Rd. vs. Chicago, 201 U. S. 506.
Jenkins vs. U. S., 60 Ct. Cls. 23.
Jenkins vs. U. S., 273 U. S. 649.

upstream from claimant's land that did not involve invasion of any part of his land is not sufficient.

Bedford vs. United States, 192 U. S. 217, 225.

6. The United States is not responsible to riparian owners for consequential damages from the mere deflection of water by reason of structures lawfully constructed in aid of navigation.[12]

7. We admit property owners cannot obstruct the channel of a navigable river in its natural state and if such property owner does so obstruct the channel, he owes the uncompensated duty to remove the obstruction, particularly where Congress has held the portion of the river where the obstruction exists is necessary for navigation.

United States vs. Chandler-Dunbar Co., 229 U. S. 53, 33 S. Ct. 667.

8. But we do claim the Government cannot by the construction of a dam, artificially raise the water levels and take the property of a riparian owner or substantially impair the usefulness of such property such as a rice plantation, farm or such as a railroad or telegraph line without compensating the owner under the Fifth Amendment.

United States vs. Cress, 243 U. S. 316.

United States vs. Lynah, 188 U. S. 445.

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[12]Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251, 263.
W. A. Ross Constr. Co. vs. Yearsley (C. C. A. 8), 103 F. (2d) 589, 592.

The case of W. A. Ross Construction Co. vs. Yearsley, supra, on page 592, distinguishes the Lynah and Cress cases.

The Court Properly Denied Motion of the United States, Made at the Close of the Testimony, to Dismiss From the Proceeding the Portion of the Property Claimed to Be an Encroachment in the Mississippi River.

(Assignment of Error No. 13.)

This assignment of error was abandoned by the Government's attorney on oral argument before the Circuit Court of Appeals but, inasmuch as the motion to dismiss is referred to on page 5 of the petition, it may be wise to briefly refer to this motion.

The motion was not made timely. The Government is the same as any other litigant when it brings an action.[13]

The Trial Court, in denying the motion to dismiss, stated rather fully his reasons for so doing (R. 154). It should be kept in mind that at the time this motion was made, hearing had been held before the Commissioners and award made to the respondents. Appeal had been taken to the District Court. Immediate possession of the property, including the four segments involved, had been ordered by the Court and taken by the petitioners. The water had been artificially raised against the embankment and through the railroad's bridges and culverts to the pool level. The Railroad and Telegraph Companies had taken protective measures as to their property and, in so doing, had expended large sums of money. The trial on the appeal had been completed so far as the taking of the testimony was concerned. During the trial, the petitioners had submitted to the Trial Court the

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[13] **Mountain Copper Co. vs. United States** (C. C. A. 9), 142 Fed. 625.
United States vs. Barber Lbr. Co. (C. C., Ida., C. D.), 169 Fed. 184, 187, 188.
United States vs. James Stinson, et al., 197 U. S. 200, 207.
The Steamer Siren and Cargo, etc., vs. United States, 74 U. S. 152, 165.

question as to whether or not the respondents were entitled to recover compensation for the taking of their property in the four segments here involved. It was only after an adverse ruling had been made by the Trial Court that the Government decided and tried to dismiss the segments in question from the proceeding.

We submit the Government is the same as any other litigant before the Court and could not, after such adverse rulings and expenditures of money by the respondents, dismiss the property involved in this appeal from the proceeding.

CONCLUSION

It is true the principles here involved are important to the Government, Railroad, Telegraph and Telephone and Power Companies whose lines are located on the bottom lands of the Mississippi River and many other inland streams, as well as to the much larger group of riparian owners who use such bottom lands for grazing, hay, woodlots, rice cultivation, artificial fish ponds, piers, wharves and embankments to reach the navigable channel of such rivers.

As to the Judgment for Lands Taken in Winona County.

The Government's offer to prove the respondents' structures in 1910 were constructed between low and ordinary high water mark was immaterial as no offer was made to prove such condition existed in 1933 when condemnation proceedings were commenced or on August 4, 1934, when immediate possession was taken. The Government failed to prove Walters Creek adjacent to claimed encroachment areas II and III was a navigable waterway of the United States, although permitted so to do by stipulation of the parties (R. 145, 147).

As to the Judgment for Lands Taken in Both Winona and Wabasha Counties.

The respondents conceded their embankments in Wabasha County were between low and ordinary high water elevations of the river and if we assume (contrary to the fact) that the same situation existed in the claimed encroachment areas in Winona County, the offer of proof was immaterial because it is, without dispute, shown that no portion of respondents' property or structures invaded the navigable channel of the river and did not obstruct or interfere with navigation therein (R. 135-138),

Under such circumstances, this Court has held riparian owners are entitled to compensation from the United States where the use of their property located between low and ordinary high water marks is destroyed or the use thereof substantially impaired.[14]

The servitude of respondents' property to navigation is confined to the natural widths, levels and flows of the river, whereas all of the damage here involved and the compensation awarded respondents therefor was due solely to the artificial raising of the Mississippi River water levels by the

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[14] United States vs. Lynah, 188 U. S. 445.
Williams, et al., vs. United States, 104 Fed. 50.
United States vs. Williams, 188 U. S. 485.
King vs. United States, 59 Fed. 9.
United States vs. King, 164 U. S. 703.
Heyward vs. United States, 46 Ct. Cls. 484, 52 Ct. Cls. 87.
United States vs. Heyward, 250 U. S. 633.
Lowndes, et al., vs. United States, 105 Fed. 838.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 853.
Yates vs. City of Milwaukee, 77 U. S. 497.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
Jacobs vs. United States, 290 U. S. 13, 16.

Government to a point in excess of ordinary high water mark.[15]

The Trial Court properly denied the motion of the United States made at the close of all the testimony to dismiss from these proceedings the property involved here. Such motion was not made timely.

We respectfully submit the Circuit Court of Appeals for the Eighth Circuit properly affirmed the judgments of the United States District Court, District of Minnesota, First Division, in the proceedings involving property of respondents in both Winona and Wabasha Counties.

Dated November 27, 1940.

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL,
Attorneys for Respondents,
25 Milwaukee Station,
Minneapolis, Minnesota.

Of Counsel:
A. N. WHITLOCK,
C. S. JEFFERSON,
Chicago, Ill.

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[15] United States vs. Cress, 243 U. S. 316, 319.
Jacobs vs. United States, 290 U. S. 13, 16.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134—Writ denied, United States vs. C., B. & Q. Rd. Co., 298 U. S. 689.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 854.
Weaver vs. Miss. & Rum River Boom Co., 26 Minn. 534, 538.
United States vs. Wheeler Township (C. C. A. 8), 66 F. (2d) 977, 984.

ILLUSTRATIVE CROSS-SECTIONS I, II, III AND IV

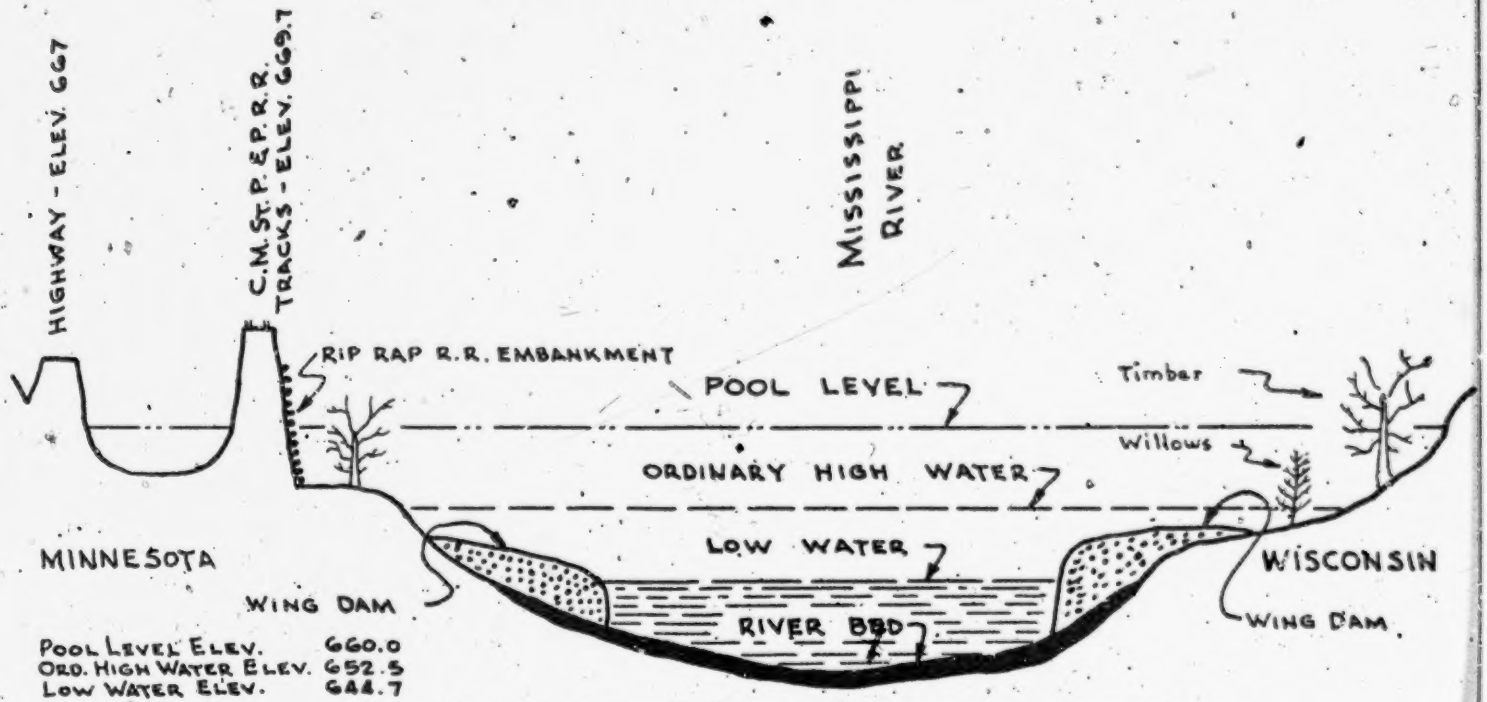
Appendix I—Claimed encroachment area I, Winona County, is adjacent to the Minnesota shore of the Mississippi River. The vertical distances have been exaggerated about ten times over horizontal distances so as to include all of the area on one page.

Appendices II, III—Respectively show claimed encroachment areas II and III in Winona County. The railroad in each of these areas is adjacent to Walters Creek. On each of the illustrations, the channel of the river is such a great distance from the railroad tracks that it was necessary to exaggerate the vertical distances over the horizontal distances respectively thirty and twenty-five times.

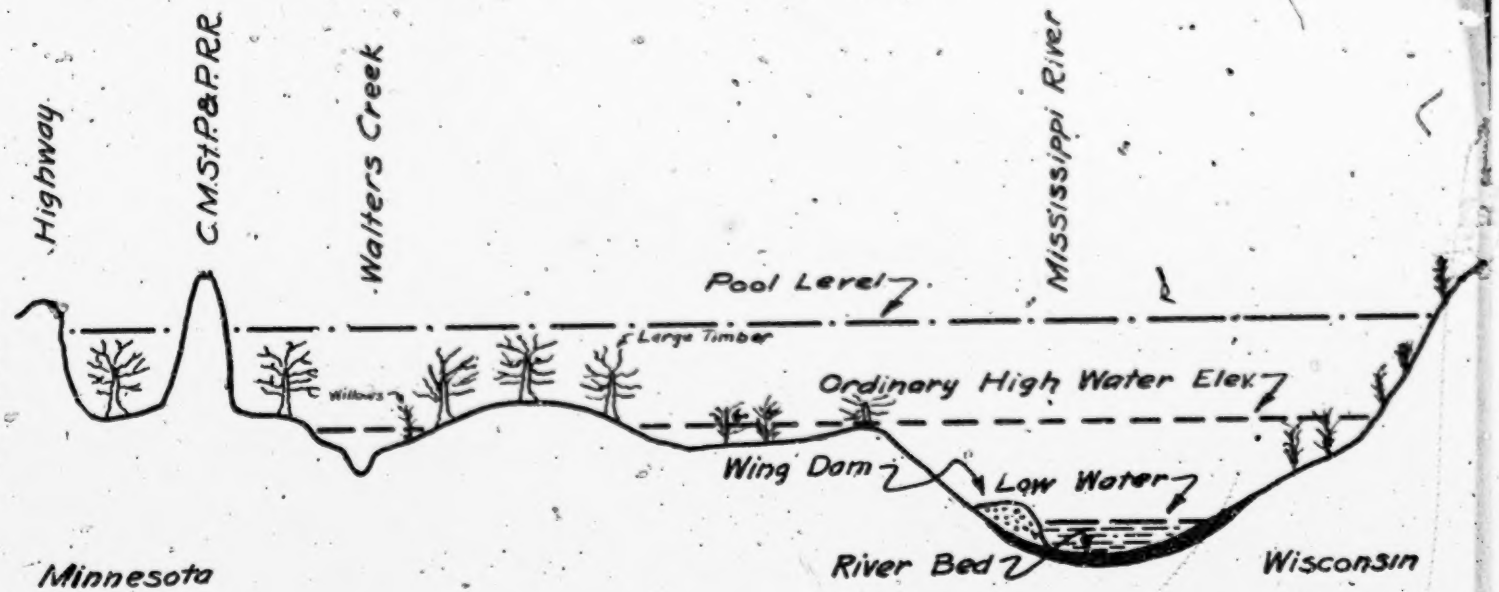
Appendix IV—Illustrates claimed encroachment area in Wabasha County in the Minneiska Station grounds. Here the railroad is also adjacent to the Minnesota shore of the Mississippi River. Vertical distances are exaggerated ten to twelve times over horizontal distances.

Each one of the four cross-sections shows the low and ordinary high water elevations in each area. The approximate distances the wing dams extend out from the railroad embankment, the river bed under the low water channel and the horizontal distance from the railroad tracks to ordinary high water mark, to the river end of the wing dam, to low water mark and to the center of the river are also shown. Each cross-section represents the average condition in each of the areas. They each show a representative wing dam, water surface at low water, at ordinary high water and at normal pool level of 660. Also, they show general location of large timber as well as general location of willows.

APPENDIX I



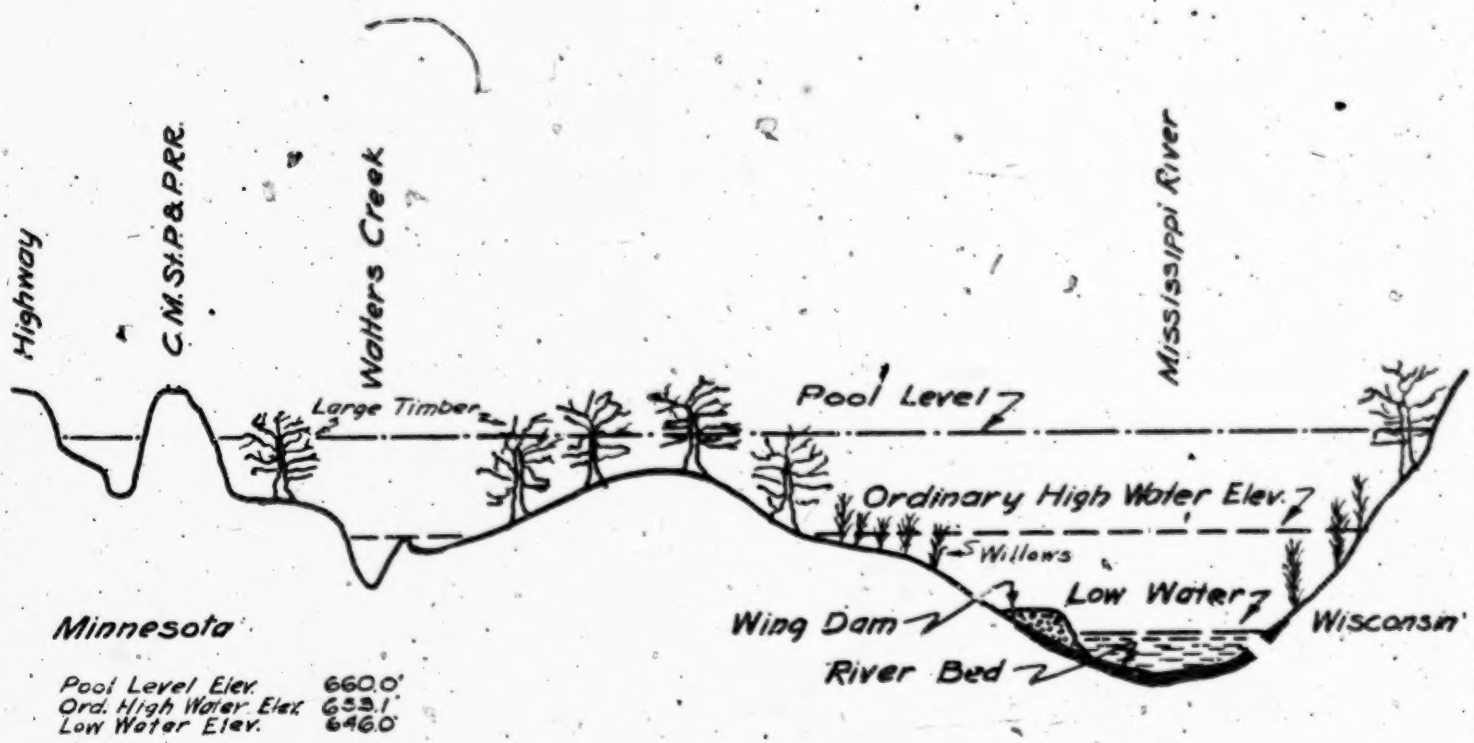
ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA NO. 1 IN WINONA COUNTY



Pool Level Elev.	660.0
Ord. High Water Elev.	652.9
Low Water Elev.	645.2

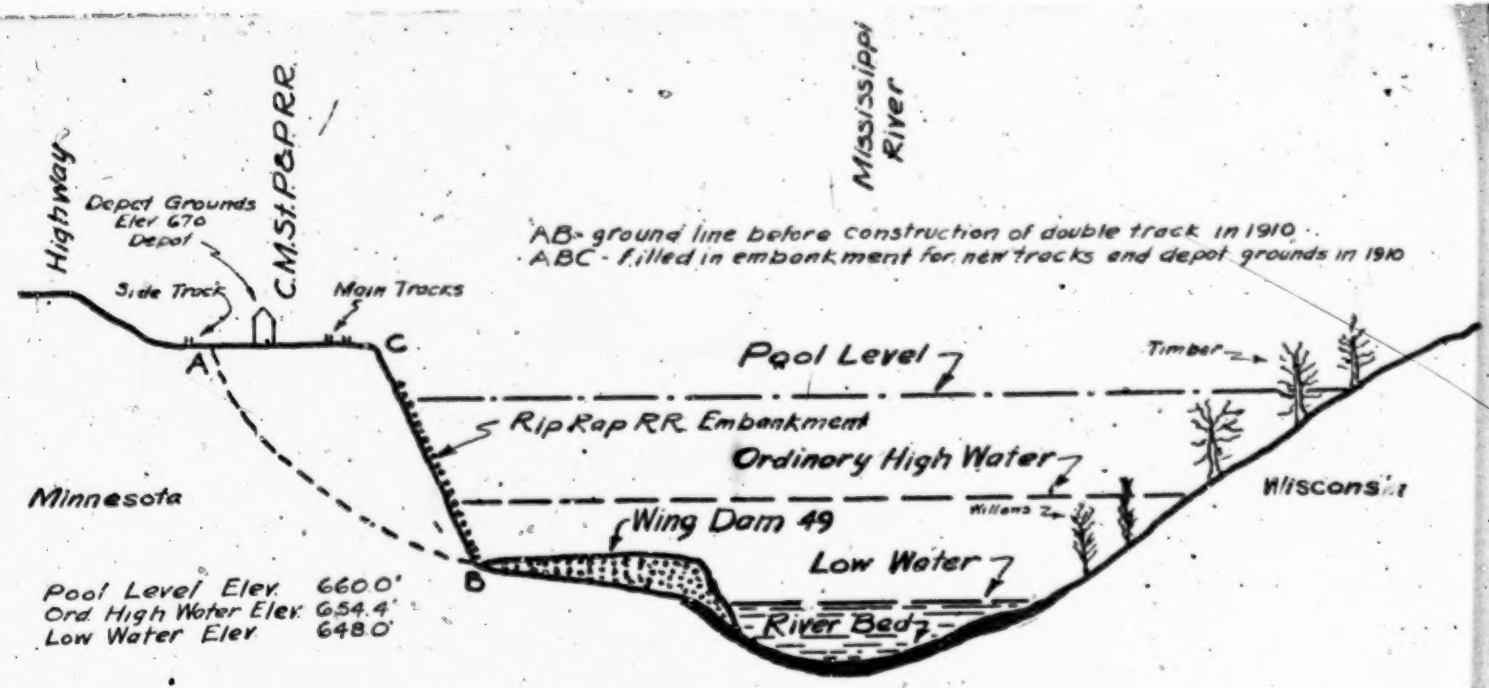
ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA No. II IN WINONA COUNTY

0 100' 700' 1400' 2000' 2400'



ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA No III IN WINONA COUNTY

0 200 1300 2000 2600



ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA IN WABASHA COUNTY

0 50' 125' 225' 325'

LOT 2
9.96A
B-51
State of
(State
LOT 8
25.80A
Brush
Meadow
State of Wisconsin
(State Po
LOT 9
44.58A.
Reg. 43.58A.
Bal. 1.00A.
Light-Gordon
(Old Eq Bird
State of Wisc
(State Pa
Mississippi
℄ of Earth Dike
RIVER
Brush & Timber
Sand Bar
Willows
Mud Flat
Fred Hartman
Reg. 33.62A
Bal. 30.37 A
Wi-9
Edwin Schell
Wi-8
Reg. 56.70A
Bal 55.40A
Casper Keller
190A
LOT 1
58.60 A.
LOT 2
37.63 A.
Wi-78
Schell
Bridge Floor Elv. 6096
WATERS CREEK
C.M.St.P.&P.R.R.
Telephone Line
Power Line
Minnesota
Brush & Timber
West 97.0
Gage No 14
Zero = 647.06
Gage No 5
Rock Dam
4910
4920
4930
4940
4950
L-82
T 3
2

State of Wisc. (State Park)

S 40°-09'E -1.

40.00A.
9.98 A.
Reg. 30.02 A.

B-26

Charles A. Kirchner et al

LOT 11
37.80A.
Reg. 4.85A.
Bal. 32.95A.

28 27 34

TOD DIKE

B-10

Charles A. Kirchner et al

LOT 3
43.84A.
9.25A.
Reg. 34.59A.
Bal.

Project

S 40°-45'E -929.9

LOT 9
44.58A.
Reg. 43.58A.
Bal. 1.00A.

Light Cordwood (Oak & Birch)

S 42°-00'E 681.8'

State of Wisconsin

LOT 10
29.50A.
26.80A.
2.70A

S 42°-00'E -1100'

LAKE JOHNSON

B 9
Charles A. Kirchner et al

LOT 2
5.34A.
Reg. 5.53A.
Bal.

33

B 8
660.9T
656.90

B-22

Charles A. Kirchner et al

LOT 1
3.52 A.

Dike

RIVER

B-7

JOHNSON ISL. (ISL. 51)

Reg. 23.95A.

SLOUGH

Willows

Sand Bar

T.B.M.
655.94

GAGE No. 14
ZERO = 647.06

Wi-5
C.M.St.P. & P.R.R.

Wi-4
C.M.St.P. & P.R.R.

Wi-3
C.M.St.P. & P.R.R.

Wi-2A
C.M.St.P. and

CREEK

10'X12' Stone Culv.

108 36" Culvert
Rip Rap

325'

W.S. 650.99
6-25-30

Dept. of Fish & Game House

4950

4960

4970

4980

5000

Power Line

Telephone Line

MON. 1
1091

2B

OD DIKE E

Project Boundary

B-10
Charles A Kirchner et al
LOT 3
S 40°45 E-929.9
43.84 A.
9.25 A.
34.59 A.
Reg
Bal

B-5
State of Wisconsin
(State Park)
LOT 4
Reg 39.80 A.
Bal 21.18 A
18.62 A.

B-4
State of Wisconsin
(State Park)
LOT 6
41.25 A.

Project Boundary

B-2
State of Wisconsin
LOT 5
25.22 A.

(State Park)

Timber
Marsh
Timber
Timber
Timber
Timber
Slough
Slough
Slough
Sand bar
Sand bar
SLOUGH

MON. 3
MON. 10
MON. 1
MON.
TBM
TBM
W.S. 650.99
6-25-30
W.S. 650.67
6-28-30

N32°-10' E

Wi-2A
C.M.St.P. & P.R.R.
and others
Req. 2.65 A.
Land for Site

Wi-1
C.M.St.P. & P.R.R.
and others
Req. 1.30 A.
Land for Site

C.M.St.P. & P.R.R.

Req. 19.05 A.

Req.

B-1

Government N

PORTION OF
RAILROAD EXHIBIT I

0 500 1000

SCALE 1" = 400'

L-82

LOT 1
58.60 A.

Casper Keller
190A

Wi-8
Edwin Schell
Reg. 5G.70A.
Bal. 1.30A.
55.40A

Wi-7B
Edwin Schell
30.63A
R.R 2.20A
Hwy 0.37A
Reg 3.93A
Bal. 27.13A.

Project Boundary

LOT 2
37.63 A.

WALTERS CREEK

Wi-7A
George A. Whitmore et al
7.00A.
Hwy: 0.40A.
Reg. 0.60A.
Bal. 6.00A.

24" con. C. Elv. 673.6

Bridge Floor Elv. 666.

West 97.0

C.M.St.P.&P.R.R.

Highway

4920

4930

4940

4950

4960

Telephone Line

Power Line

1½" C.I. pipe

ROCK DAM

GAGE No. 14 ZERO = 647.06

U.S. Dept. of Agriculture

10x12 Stone 662.2

8'x10' Stone 665.5

120C

120A

State of Minnesota

LOT 3
43.54 A.

L-80

LOT 2
56.55 A.
Reg. 1.85 A.
Bal. 54.70 A.

State of Minnesota

24" Conc Culv.

672.9

665

670

4927+00

4936+00

4948+86.5

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA No. III

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA No. II

T 108 N. R 29 W. 5th P.M.

L-527

SCALE 1" = 400'

4960 4970 4980 4990 5000

Wi-4 C.M. St.P. &P.R.

Wi-2B C.M. St.P. &P.R.R.

Wi-3 C.M. St.P. &P.R.

Wi-1 C.M. St.P. &P.R.R. and others Req. 1.30 A. Land for Site

LOT 2 56.55 A. Req. 1.85 A. Bal. 54.70 A.

LOT 29.70 A. State of Minnesota

LOT 34.88A Req. 1.10 A. Bal. 33.78 A.

LOT 4 56.00A.

LOT 3 27.00 A. C.M.ST.P.&P.R.R. 13.30 A.

State of Minnesota

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA Nº I

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA Nº II

4968+86.5 4978+86.5 4990+86.5

3" I.P. Bronze Cap Set by U.S.E.O.

Bronze Cap

1" Pipe

Power Line Telephone Line

MON. 1 =1+09.1

MON. 8 0+00

Highway 61

Government M